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No. 80-1285

IN THE

SUPREME COURT OF THE UNITED STATES

October, Term 1980

CARL W. BROWN - - - - - Petitioner

vs.

EARL J. HARTLAGE - - - - Respondent

On Writ of Certiorari to the Court of Appeals of Kentucky

REPLY BRIEF FOR PETITIONER, CARL W. BROWN

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The Brief of the Amicus Curiae filed in this action suggests that the Kentucky Court's interpretation of KRS 121.055 does not violate Petitioner's First Amendment right to engage in political speech by promising to serve for less than permitted. This position indicates a basic misunderstanding of this Court's precedents and their meaning and demands a reply.

ARGUMENT

I. The Interpretation of KRS 121.055 Unduly Infringes Upon the First Amendment Right of Political Speech:

The Amicus Curiae concedes that the statement of the Petitioner, that he would serve for less than permitted, was indeed political speech coming under the

umbrella of protection of the First Amendment provided to citizens of the states by the Fourteenth Amendment. Both Petitioner and the Amicus Curiae agree that the Commonwealth of Kentucky has a compelling interest in the electoral process and has the right to regulate in the area. The disagreement occurs over the extent of such regulation.

The Amicus Curiae does not cite any of this Court's long standing precedents as defining the parameters of such regulation. He relys heavily on *United States* v. *O'Brien,* 391 U. S. 367 (1968), as the linchpin of his argument, maintaining that it permits Kentucky to invalidate the Petitioner's election. *United States* v. *O'Brien,* is not a case of interpretation, but a case where the Appellant's constitutional attack was upon that portion of the selective service laws which requires a citizen not to knowingly destroy his registration card. O'Brien argued that the act of destruction was linked to First Amendment speech. In our present circumstance, the attack by Petitioner is upon the Court of Appeals of Kentucky's interpretation of the extent and manner of Kentucky's ability to regulate, not whether a state may regulate under any state of fact. In short the Amicus Curiae bases his argument upon the concept that because Kentucky may regulate the electoral process, ipse dixit, it may regulate all political speech in the form of campaign promises regardless of the intrusion upon fundamental First Amendment rights. This is not consistent with this Court's requirement as to the state's duty in regard to the regulation of citizen

activities coming under the umbrella of the protected rights of the First Amendment.

This Court holds "[t]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut*, 310 U. S. 269 (1940).

Where a state statute seeks to regulate in an area impacting fundamental First Amendment rights the regulation sought must be very narrow and subject to exacting judicial scrutiny. *Citizens Against Rent Control, Coalition for Fair Housing, et al., Appellants,* v. *City of Berkley, California, et al.,* —— U. S. ——, 50 U.S.L.W. 4071 (decided December 14, 1981); *Hynes* v. *Mayor of Oradell*, 425 U. S. 610 (1976); *Buckley* v. *Valeo*, 424 U. S. 1 (1976); and *Schad* v. *Borough of Mount Ephraim*, —— U. S. ——, 49 U.S.L.W. 4597 (1981).

KRS 121.055, states in pertinent part:

> "No candidate . . . shall . . . promise . . . things of value to any person in consideration of the vote . . . of that person."

The Courts of Kentucky have refused to narrowly construe this statute so as to prevent unallowable infringement upon First Amendment rights of candidates running for office. The Amicus Curiae does not address this point. The reason for this paucity of analysis is clear. The Kentucky Court of Appeals decision cannot withstand this Court's mandate permitting only the narrowest of intrusion upon First Amendment freedom.

II. The Kentucky Court's Prior Interpretations of KRS 121.055 Did Not Give Guidance to the Petitioner:

The Amicus Curiae firmly takes the position that KRS 121.055 does not suffer from constitutional infirmity due to vagueness because of the Kentucky Court's prior decisions interpreting the statute. He argues that *Sparks* v. *Boggs,* Ky., 339 S. W. 2d 480 (1960) and *Draughn* v. *Martin,* Ky., 350 S. W. 2d 161 (1961) are interpretations of KRS 121.055 by Kentucky Courts which afforded the Petitioner knowledge that his statement was in violation of the statute. As is argued in Petitioner's Brief on the Merits, this argument by the Amicus Curiae is without merit. In *Sparks* v. *Boggs, supra,* the offending candidate promised to serve for One Dollar per annum when the controlling salary limitation statute stated that the Commissioner was to receive an annual salary of not more than $500.00 per annum. The offending candidates offered to give the remaining salary to select groups in the community as a charitable gift. In the matter at hand, Petitioner stated that he would serve for $3,000 less than the permitted $20,000 salary. In effect, Petitioner stated he would serve for $17,000 per year rather than $20,000 per year. KRS 64.530(6) is the only statute which explicitly states the salary a County Commissioner may receive. It mandates that the salary of County Commissioners serving in counties containing a city of the first class[1] shall not exceed $9,600 per annum. Obviously, the Petitioner's statement to

[1]The situs of the City of Louisville is Jefferson County. Louisville is a city of the first class.

serve for $17,000 is not a statement that he would serve for less than the statutory requirement of $9,600 per year. Nor did the Petitioner offer the saving of $3,000 to any select group in the community, as was done in *Sparks*. Accordingly, the *Sparks* rationale does not give guidance to the Petitioner.

The Amicus Curiae also relys upon *Draughn* v. *Martin, supra,* to inform the Petitioner that his statement was a violation of KRS 121.055. *Draughn* v. *Martin* involves a campaign promise by a candidate running for Tax Commissioner, not to tax certain taxable property, if elected. This promise by the offending candidate, as noted by the Courts of Kentucky, was a promise to the electorate not to perform his required statutory duties to tax. Thus the offending candidate offered a dereliction of his statutory duty for the benefit of the general populous. In the case at bar the Petitioner did not promise any dereliction of duty by his statement; but, to the contrary advocated a "pro tanto reduction in taxes," *Sparks* v. *Boggs, supra,* and thus this rationale is equally inapplicable.

Clearly, men of common intelligence could not fathom that the Court of Appeals of Kentucky's prior decisions were the interpretive basis from which to judge their campaign promises. The Petitioner can not be reasonably required to foresee that KRS 121.055 would be construed in such fashion as to hold his campaign promise to serve for less than permitted a violation. Accordingly, the Court of Appeals of Kentucky's prior interpretations cannot be considered to cure the constitutional infirmity of vagueness. Kentucky's

Courts have had the opportunity to cure this constitutional infirmity. Having been given the chance to interpret its own statute the Courts still have not interpreted, for candidates such as Petitioner, the meaning of the term "promise", nor the meaning of the term "things of value". Surely, before KRS 121.055 is applied to Petitioner, Petitioner as well as all other candidates for political office in the Commonwealth of Kentucky, should be given this needed direction. It has not been forthcoming and we are accordingly before this Court.

* * * * * * * *

This Court posits that the general test of vagueness applies with particular force in review of laws dealing with speech. *Hynes* v. *Mayor of Oradell, supra.* Further, this Court has required that stricter standards of permissible statutory vagueness are to be applied to a statute having a potentially inhibiting effect on speech; and, a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. *Buckley* v. *Valeo, supra.* Petitioner submits, that the Amicus Curiae's argument that KRS 121.055 does not suffer from vagueness due to the Kentucky Courts' prior decisions interpreting the statutes, is not persuasive.

III. The Amicus Curiae's Argument of Impossibility of Legal Performance:

The Amicus Curiae argues:

> "The Court of Kentucky in interpreting this statute has clearly and unequivocally established

> that candidates are free to say anything not otherwise proscribed by the First Amendment in an election campaign, and that line is crossed only if the act promised is a legal impossibility under the statutes or Constitution of Kentucky. This is a valid distinction." Amicus Curiae Brief, p. 13.

This offends the very purpose of political speech and its protection under the First Amendment. This Court has often noted that one of the major purposes of the First Amendment right of free speech is to afford the free discussion of political and governmental affairs. *Mills* v. *Alabama,* 384 U. S. 214 (1966); *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265 (1971). Clearly, this Court has never delineated the limit of permissible speech and in particular political speech, by the requirement that only those things that are "legally possible" at the time of their pronouncement are due First Amendment protection. Surely, such a standard would freeze in time forever, the status quo of all political and legal discussion. The very essence of the First Amendment is to encourage the free exchange of ideas so that the law may change as does the mores of our society and thus assure our form of government the organic vitality intended by the founding fathers. In reality, all campaign promises to change the legal status quo are legal impossibilities at the time they are made. No individual member of any legislative body is more than a cog. It requires the plurality of the body as a whole to change the status quo. Clearly, the standard offered by the Amicus Curiae cannot pass constitutional muster.

* * * * * * *

This argument of the Amicus Curiae also ignores this Court's requirement that before the state may act it make an affirmative showing that there is a clear and present danger to the state's compelling interest in the area in which it seeks to regulate. *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) and *Thomas* v. *Collins,* 323 U. S. 516 (1945). The Amicus Curiae does not address the clear and present danger test. As noted in Petitioner's Brief on the Merits and in the Petitioner's Writ of Certiorari, the Petitioner retracted his statement to serve for less than the permissible salary on August 19, 1979, some 4 days after it was made. The statement to serve for less and the retraction were both made considerably prior in time to the election held on November 6, 1979. Never again did the Petitioner state he would reduce his salary and his running mate, Dr. William Creech, who had made this same statement and retraction simultaneously with Petitioner, was defeated. Clearly, the Petitioner's statement could not have had any effect upon the outcome of the election. This was so found by the trial court. (J.A., 25). Before a compelling interest of the state may be invoked the state must show that there was a clear and present danger to this compelling interest. See *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Herndon* v. *Lowry,* 301 U. S. 242 (1937); and *Communist Party of Indiana* v. *Whitcomb,* 414 U. S. 441 (1974).

Assuming arguendo, that Petitioner's statement is a violation of KRS 121.055 at the time of its utterance, the retraction and defeat of Petitioner's running mate clearly establishes that Petitioner's campaign state-

ment did not effect the outcome of the election. Thus, there can be no clear and present danger to the state's compelling interest in governing its electoral process. We think the lack of discussion by the Amicus Curiae of the retraction and the election results in regard to the Petitioner's running mate speaks for itself. This Court mandates a showing that the state's compelling state interest has been offended. No such showing has been made in this matter. Thus the standard of strict liability for such political advocacy as argued by the Amicus Curiae is constitutionally infirm.

IV. The Amicus Curiae's Representation of the Noncriminal Nature of KRS 121.055 Is in Error:

The Amicus Curiae argues:

> "This is a noncriminal statute and at worst, the Petitioner would be called upon to again submit himself to the voters without the promise of legally impossible acts to the electorate's verdict." Amicus Curiae Brief, pp. 7 and 8.

This argument is factually and legally incorrect. KRS 121.990(8) states specifically:

> "Any person who violates any of the provisions of KRS 121.055 shall be fined not more than Five Thousand Dollars ($5,000) or imprisoned in the county jail for not more than 6 months, or both."

As the above statute clearly indicates violation of KRS 121.055 does expose the actor to criminal penalties. To be sure, in the matter at bar, no criminal sanction

was sought against Petitioner. However, contrary to the Amicus Curiae's argument, the criminal or non-criminal nature of a statute has no effect upon whether or not the Petitioner is entitled to the protection of the First Amendment. Clearly, the application of the First Amendment to any citizen's rights does not depend on his being subject to criminal sanctions.

CONCLUSION

For each and all of the foregoing reasons and discussion, the Petitioner renews his argument that the judgment of the Court of Appeals of Kentucky should be reversed, and the mandate of this Court should issue directing that Petitioner's election is valid.

Respectfully submitted,

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STATUTORY APPENDIX

121.055. Candidates prohibited from making expenditure, loan, promise agreement or contract as to action when elected, in consideration for vote.—No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract. (Enact. Acts 1974, ch. 130, § 182; 1980, ch. 292, § 3, effective July 15, 1980.)

64.530. Compensation of county officers and employes, and members of fiscal court.—(1) Except as provided in subsection (5) and (6) of this section, the fiscal court of each county shall fix the compensation of every county officer and employe except the officers named in KRS 64.535 and the county attorney. The fiscal court may provide a salary for the county attorney.

(2) For the purposes of this section, justices of the peace and constables in all counties shall be deemed to be county officers and deputies or assistants of county officers shall be deemed to be county employes, but employes of county boards or commissions which are now authorized by law to fix the compensation of their employes shall not be deemed to be county employes for the purposes of this section.

(3) In the case of officers compensated from fees, or partly from fees and partly by salary, the fiscal court shall fix the maximum compensation that any officer except the

officers named in KRS 64.535 may receive from both sources. The fiscal court may also fix the number of deputies and assistants, and, the compensation thereof, and the maximum amount that the officer may expend each year for expenses of his office.

(4) In the case of county officers elected by popular vote and the county attorney, in the event the fiscal court provides him a salary, the monthly compensation of the officer and of his deputies and assistants shall be fixed by the fiscal court not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term but the compensation of his deputies or assistants may be reviewed and adjusted by the fiscal court not later than the first Monday in May of any successive year upon the written request of the officer. On or before August 1, 1966, the fiscal court shall fix the salary provided herein for the county attorneys for the term commencing in January, 1966, notwithstanding any other provisions of this section which may be inconsistent herewith.

(5) Nothing in this section shall apply to property valuation administrators or their deputies, assistants and expenses, in any county, or to the circuit court clerk, county clerk, sheriff, jailer, and their deputies, assistants and expenses, in counties having a population of seventy-five thousand (75,000) or more.

(6) Justices of the peace serving on a fiscal court in any county, and county commissioners serving on a fiscal court in any county other than one (1) containing a city of the first, second, third or fourth class, shall be paid for their services, out of the county treasury, not to exceed the maximum compensation allowable under KRS 64.527. The fiscal court shall fix the amount to be received within the above limit, but no change of compensation shall be effective as to any member of a fiscal court during his term

of office. The compensation of county commissioners serving on fiscal courts in counties containing a city of the first class shall not exceed nine thousand six hundred dollars ($9,600) per year, in counties containing cities of the second class it shall not exceed nine thousand dollars ($9,000) per year and in counties containing cities of the the third or fourth class it shall not exceed twenty percent (20%) more than the annual compensation paid in the county for the calendar year immediately preceding 1974, and all of said annual salaries shall be payable monthly. Justices of the peace and county commissioners shall not receive any compensation for their services on the fiscal court, other than as provided by this section; nor shall they receive any compensation for serving on committees of the fiscal court. The fiscal court shall fix the amount to be received within the above limit, but no change of compensation except as provided in KRS 64.285 shall be effective as to any member of a fiscal court during his term of office. (Enact. Acts 1950, ch. 123, § 9; 1956, ch. 144; 1958, ch. 126, § 2; 1962, ch. 214, § 1; 1964, ch. 109, § 3; 1966, ch. 15, § 2; 1966, ch. 255, § 75; 1968, ch. 152, § 33; 1970, ch. 203, § 1; 1972, ch. 30, § 1; 1972, ch. 203, § 5; 1972, ch. 358, § 1; 1974, ch. 60, § 2; 1974, ch. 254, § 4; 1976, ch. 306, § 1; 1976 (Ex. Sess.), ch. 17, § 20, effective January 1, 1978; 1976 (Ex. Sess.), ch. 14, § 40, effective January 2, 1978; 1978, ch. 196, § 1, effective June 17, 1978; 1978, ch. 384, § 131, effective June 17, 1978.)

121.990. Penalties.—(Irrelevant Sections omitted.)

(8) Any person who wilfully violates any of the provisions of KRS 121.055 shall be fined not more than five thousand dollars ($5,000), or imprisoned in the county jail for not more than six (6) months, or both.